Supreme Court, U.S.
FILED
NOV 2 4 1999
OFFICE OF THE CLERK

No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA
Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

JOHN C. EASTMAN
THE CLAREMONT INSTITUTE
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
250 W. FIRST ST., SUITE 330
CLAREMONT, CA 91711

EDWIN MEESE III
COUNSEL OF RECORD
214 MASSACHUSETTS AVE., N.E.
WASHINGTON, D.C. 20002
(202) 546-4400

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

1. Whether a state law requiring the Boy Scouts, a private membership organization dedicated to fostering the development of civic and moral virtue in young boys, to appoint an avowed homosexual activist as an Assistant Scoutmaster infringes the Boy Scouts rights of freedom of speech and association?

2. Whether such a state law infringes the rights of parents, who choose to augment the moral education of their children by participating in the Boy Scouts organization, to direct the upbringing of their own children.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iv

INTEREST OF AMICUS CURIAE. 1

REASONS FOR GRANTING THE WRIT 3

A. THE DECISION BELOW DANGEROUSLY INTERFERES WITH THE MORAL TRAINING PROVIDED BY THE BOY SCOUTS, TRAINING WHICH THE AMERICAN FOUNDERS BELIEVED TO BE ESSENTIAL IN A REPUBLICAN FORM OF GOVERNMENT 3

B. THE NEW JERSEY SUPREME COURT'S RULING IS CONTRARY TO WELL-ESTABLISHED PRECEDENT OF THIS COURT. 7

1. Forcing the Boy Scouts to Admit Dale as an Adult Leader Violates the Boy Scouts' Freedom of Association. 7

2. Forcing the Boy Scouts to Accept Dale as a Spokesman/Adult Leader Constitutes Constitutionally-Prohibited Compelled Speech 10

3. Undermining the Boy Scouts' Mission Infringes the Constitutional Right of Parents to Direct the Moral Upbringing of their Children. 11

C. THE RULING BELOW IS IMPLICITLY IN CONFLICT WITH DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS AND SEVERAL STATE COURTS OF LAST RESORT 12

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977).....7

Board of Directors of Rotary International v. *Rotary Club of Duarte*, 481 U.S. 537 (1987).....7, 8, 9, 15

Bowers v. *Hardwick*, 478 U.S. 186 (1986) 12

Curran v. *Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998) ... passim

Curran v. *Mount Diablo Council of the Boy Scouts of America*, 48 Cal.App.4th 670, 29 Cal.Rptr.2d 580 (Cal.App. 1994), *aff'd*, 17 Cal. 4th 670, 952 P.2d 218 (Cal. 1998) 8

Dale v. *Boy Scouts of America*, 308 N.J. Super. 516, 706 A.2d 270 (N.J. Super., App. Div., 1998) 11, 13

Dale v. *Boy Scouts of America*, 160 N.J. 562, 734 A.2d 1196 (N.J. 1999) ..... passim

Engel v. *Vitale*, 370 U.S. 421 (1962) 6

Everson v. *Board of Education*, 330 U.S. 1 (1947) 6

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).....10, 11, 13

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 6

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 11

New York State Club Ass'n v. *City of New York*, 487 U.S. 1 (1988).....7, 8, 9

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 11

Quinnipiac Council, Boy Scouts of America, Inc. v. *Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987) 14

Randall v. *Orange County Council*, 17 Cal.4th 736, 952 P.2d 261 (1998).....11

Roberts v. United States Jaycees, 468 U.S. 609 (1984).....7, 8, 9

Seabourn v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995) 4

Wallace v. *Jaffree*, 472 U.S. 38 (1985).....9

Warfield v. *Peninsula Golf & Country Club*, 10 Cal.4th 594, 896 P.2d 776 (Cal. 1995) 14

Welsh v. *Boy Scouts of America*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993).....6, 12

West Virginia State Bd. of Ed. v. *Barnette*, 319 U.S. 624 (1943).....10

Wooley v. *Maynard*, 430 U.S. 705 (1977) 10

CONSTITUTIONS AND STATUTES

Mass. Const. of 1780, Pt. 1, Art. 3 3

Mass. Const. of 1780, Ch. V, Sec. 2 5

Pa. Const. of 1776, Art. II, § 45 3

Va. Const. of 1776, Bill of Rights, Sec.15 3

An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. 3, 1 Stat. 51, 53 n. a 5

OTHER AUTHORITIES

THE FEDERALIST NO. 55, at 346 (Clinton Rossiter and Charles Kesler eds., Mentor 1999) 4

The Records of the Federal Convention of 1787 (Max Farrand ed., Yale Univ. Press 1966) 7

Jeffrey G. Sherman, "Love Speech: The Social Utility of Pornography," 47 Stan. L. Rev. 661, 698 (April 1995)....12

Alexis de Tocqueville, *Democracy in America* (J. P. Mayer ed. & George Lawrence trans., HarperPerrenial 1969) (1835).....5

George Washington, *Farewell Address*, reprinted in *George Washington: A Collection* 521 (William B. Allen ed., Liberty Classics 1988) 5

Thomas G. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* (Rowman & Littlefield 1997) 4

No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA
Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the inculcation of virtue in the citizenry was deemed by the Founders to be essential in a republican form of government.[1]

[1]The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as amicus curiae in cases of constitutional significance. Of particular relevance here, the Institute has published extensively about the foundations of representative government and the constitutional protections of speech and association that are necessary to protect those foundations, including a monograph entitled "On the Front Lines of the Culture War: Recent Attacks on the Boy Scouts." In addition, the Claremont Institute participated as an amicus curiae in the case below, filing briefs with both the intermediate appellate court and the Supreme Court of New Jersey.

Recently, in order to further advance its mission, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of amicus curiae briefs in cases that involve issues of constitutional significance going to the heart of the founding principles of this nation. This is such a case.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW DANGEROUSLY INTERFERES WITH THE MORAL TRAINING PROVIDED BY THE BOY SCOUTS, TRAINING WHICH THE AMERICAN FOUNDERS BELIEVED TO BE ESSENTIAL IN A REPUBLICAN FORM OF GOVERNMENT.

At a time when the nation is searching its soul seeking explanation for the child-killer tragedies in Columbine, Jonesboro, and elsewhere, the New Jersey Supreme Court has lent its voice to the full-scale assault that has been launched against the Boy Scouts of America, one of the few remaining organizations still devoted to instilling in our nation's citizenry the kind of moral virtue that the Founders of this nation thought essential in a republican form of government.

The virtually universal view of the Founders on the necessity of a virtuous citizenry to support a republican form of government is evident in the constitutions they adopted, in their public writings, and in their private correspondence. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15. The Massachusetts Constitution of 1780 echoes the sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality . . . ." Mass. Const. of 1780, Pt. 1, Art. 3. And the Pennsylvania Constitution of 1776 went even further, asserting that "Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution." Pa. Const. of 1776, Art. II, § 45.

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers: "Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another." The Federalist No. 55, at 346 (Clinton Rossiter and Charles Kesler eds., Mentor 1999).

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. As political theorist (and Claremont Institute Senior Fellow) Thomas G. West noted in his recent book, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* 160 (Rowman & Littlefield 1997):

> The Founders understood the term *self-government* in a double sense: 1) governing oneself morally, controlling one's own tendency to indulge the selfish and violent passions unreasonably; and 2) governing oneself politically, through democratic institutions that provide a wide scope for self-governing private associations such as families, churches, private schools, and businesses.

Fostering the first definition of self-government by use of a private institution envisioned in the second is what the Boy Scouts, and hence this case, is about. *See Seabourn* v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 180, 891 P.2d 385, 388 (1995) ("[The Boy Scouts] tends to conserve the moral, intellectual, and physical life of the coming generation, and in its immediate results does much to reduce the problem of juvenile delinquency in the cities . . . ." (quoting Congressional Report in Support of Act to Incorporate Boy Scouts of America)).

The Founders were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. Most of the leading Founders, therefore, turned their attentions at one time or another to education. Perhaps the best example, but by no means the only one, of this sentiment is expressed in the Northwest Ordinance, adopted by Congress for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n. a; *see also*, *e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties").

Moreover, the Founders did not rely on public institutions alone to foster a virtuous citizenry. In America, numerous private associations devoted to the development of moral character also existed and were encouraged. As Alexis de Tocqueville observed more than a century and a half ago, "[the intellectual and moral associations in America] are as necessary as the [political and industrial associations] to the American people, perhaps more so." Alexis de Tocqueville, *Democracy in America* 517 (J. P. Mayer ed. & George Lawrence trans., HarperPerrenial 1969) (1835).

The fostering of moral excellence was, for the Founders, a task intimately tied to religion. As President Washington noted in his Farewell Address, "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, *Farewell Address*, reprinted in *George Washington: A Collection* 521 (William B. Allen ed., Liberty Classics 1988). The Establishment Clause of the First Amendment, however, has been interpreted to prevent public schools from providing

moral instruction tied in any way to religion. *See, e.g., Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947) (noting in *dicta* that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions"); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). As a result, the teaching of morality and virtue–so necessary to our republican form of government–is left largely to private associations, primarily churches and groups such as the Boy Scouts. Much more is at stake in the decision of the New Jersey Supreme Court, therefore, than simply the membership policies of a single private group. As the United States Court of Appeals for the Seventh Circuit noted in a parallel case addressing whether the Boy Scouts could be compelled to admit atheists to membership:

> A great deal is at stake in the interpretation of [public accommodations] statutes. The Founding Fathers recognized that a republic cannot endure without a virtuous citizenry. . . . The central question for those concerned about maintaining the health of our republic must be, "how do individuals acquire the virtues necessary for self-government?" History provides only one answer: through the institutions of civil society, like the family, religious groups, and voluntary associations which inculcate a sense of moral values in the young.

Welsh v. *Boy Scouts of America*, 993 F.2d 1267, 1278 (CA7), *cert. denied*, 510 U.S. 1012 (1993). Especially when combined with the more customary methods discussed below by which the decision whether to grant certiorari is generally measured, the importance of this case to the perpetuation of republican institutions warrants, indeed compels, review by this Court.

B. THE NEW JERSEY SUPREME COURT'S RULING IS CONTRARY TO WELL-ESTABLISHED PRECEDENT OF THIS COURT.

1. Forcing the Boy Scouts to Admit Dale as an Adult Leader Violates the Boy Scouts' Freedom of Association.

There is perhaps no more fundamental tenet of the freedom of association than the right of the association itself to determine who shall be admitted to membership. During debate in the convention which gave us our Constitution, Gouverneur Morris noted that "every Society from a great nation down to a club had the right of declaring the conditions on which new members should be admitted . . . ." *The Records of the Federal Convention of 1787, at* 238 (Max Farrand ed., Yale Univ. Press 1966). As the Boy Scouts points out in its petition (and as The Claremont Institute noted in its brief below), the sanctity of that principal continues to be recognized to this day: "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). "Freedom of association . . . plainly presupposes a freedom not to associate." *Id.* (citing *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234-35 (1977)).

Although not absolute, *id.*, the freedom to choose one's associates is particularly strong in the context of intimate and expressive associations, such as those fostered by the Boy Scouts at issue here. There are exceptions, as this Court's rulings in *Roberts* and two subsequent cases, *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1 (1988), make clear. But the New Jersey Supreme Court mistook the exception recognized in those cases for the principle, and on the principle, the Boy

Scouts organization is readily distinguishable from the associations at issue in all three cases, for several reasons.

First, *Roberts*, *Rotary Club*, and *New York State Club Ass'n* all dealt with associations that fostered business and commercial connections. *Roberts*, 468 U.S. at 616, 626; *Rotary Club*, 481 U.S. at 549; *New York State Club Ass'n.*, 487 U.S. at 5-6. The Boy Scouts, on the other hand, is not a commercial organization. *See, e.g., Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 673, 952 P.2d 218, 220 (1998) (holding that the Boy Scouts is not a "business establishment" under the California Unruh Civil Rights Act). Second, unlike the Jaycees or Rotary Club, the Boy Scouts' structure and purpose foster relationships second to virtually no group other than a family in its degree of intimacy. *See, e.g., Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 48 Cal.App.4th 670, 29 Cal.Rptr.2d 580, 598 (Cal.App. 1994), *aff'd*, 17 Cal. 4th 670, 952 P.2d 218 (Cal. 1998).

Finally, and perhaps most importantly, the membership criterion at issue here is not based on a stereotypical generalization such as was at issue in *Roberts,* where it was claimed that admitting women would force the club to alter its civic, political or business messages (apparently based on the stereotypical view that women have a different view of such matters than men). 468 U.S. at 627-28. The Boy Scouts is *not* claiming that homosexual adult leaders are less likely than heterosexual adult leaders to be trustworthy, or brave, or loyal, and thus less able to serve as role models for those aspects of the Scout Law. But the Boy Scouts *is* contending that an avowed homosexual adult leader is less able than heterosexual adult leaders to serve as a role model for the aspect of the Scout Oath that calls on boys to be "morally straight," a phrase which the Boy Scouts itself interprets as encompassing the belief that homosexual conduct is immoral. *Curran*, 17 Cal.4th at 672, 952 P.2d at 219.

By forcing the Boy Scouts to place in an adult leadership position someone who espouses by word and deed a position about the immorality of homosexuality inimical to that taken by the Boy Scouts, the New Jersey Supreme Court repudiated the principle articulated in *Roberts*, *Rotary Club*, and *New York State Club Ass'n* that a private association could not be forced to admit members whose views were contrary to those of the organization. In *Roberts*, this Court upheld a decision requiring the Jaycees to admit women *only after* finding that the Minnesota public accommodations law did not require any change in the organization's creed or impose any restrictions on its "ability to exclude individuals or philosophies different from those of its existing members." 468 U.S. at 627. In *Rotary Club*, this Court upheld a similar decision requiring the Rotary Clubs to admit women *only after* finding that the admission of women would not affect that organization's ability to carry out its purposes "in any significant way." 481 U.S. at 548-49.

And in *New York State Club Ass'n*, this Court specifically noted: "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacles to this end." 487 U.S. at 13. Indeed, Justice O'Connor pointed out in her concurring opinion that the right to exclude individuals who do not share the organization's views exists even if the organization's purpose requires that membership be based–legitimately rather than stereotypically– on race, religion, or some other "suspect" classification. *Id.* at 19 (O'Connor, J., concurring); *see also Wallace* v. *Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("the question whether racial or sex-based classifications communicate an *invidious* message [is] in large part a legal question to be answered on the basis of judicial interpretation of social facts" (emphasis added)). Invidious discrimination is simply not at work when, for example, the Knights of Columbus limits membership to Catholics.

Apparently recognizing the force of this distinction, the New Jersey court simply mischaracterized the Boy Scouts' own beliefs, in order to avoid the force of this Court's precedents. In an opinion that can only be called Orwellian, the New Jersey court rejected the Boy Scouts' own clearly and repeatedly articulated position that homosexual conduct was immoral and therefore incompatible with the virtues the organization seeks to foster. *See Dale* v. *Boy Scouts of America*, 160 N.J. 562, 613 n.12, 614-15, 734 A.2d 1196, 1224 (N.J. 1999). This Court should not allow its precedent to be so cavalierly circumvented.

2. Forcing the Boy Scouts to Accept Dale as a Spokesman/Adult Leader Constitutes Constitutionally-Prohibited Compelled Speech.

The ruling below also flatly contravenes the unanimous holding of this Court just five terms ago in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), a ruling solidly grounded in this Court's First Amendment jurisprudence. As Justice Jackson, writing for the Court, noted more than fifty years ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943). The State's interest in disseminating an ideology "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977).

The New Jersey Supreme Court's attempt to distinguish *Hurley* and the long line of cases on which it relies denigrates the speech both of the Boy Scouts and of James Dale himself. Dale has become a staunch advocate for gay rights. Indeed, his activism is what led to the news article that brought his avowed homosexuality to the Boy Scouts' attention. Pet. at 6. Moreover, by his own reported admission, Dale seeks to re-

join the Boy Scouts as an adult leader in order to persuade the Boy Scouts that its position on the immorality of homosexual conduct is wrong. Pet. at 7. Dale's purpose here is therefore clearly speech, and under *Hurley*, the Boy Scouts cannot be compelled to carry his message. *Hurley*, 515 U.S. at 573. The New Jersey Supreme Court may be correct in its assertion that Dale does not come to Boy Scout meetings "carrying a banner," 160 N.J. at 623, but Dale clearly wears his homosexuality as a badge for all to see. It takes a blind eye to fail to recognize that the appointment by the Boy Scouts of Dale as an Assistant Scoutmaster would be the height of symbolic speech, severely undermining the Boy Scouts' own speech about the immorality of homosexuality.

3. Undermining the Boy Scouts' Mission Infringes the Constitutional Right of Parents to Direct the Moral Upbringing of their Children.

The ruling below also severely undermines the right of parents to direct the moral upbringing of their children, a right recognized by this Court more than three-quarters of a century ago as constitutionally protected. *See Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The Boy Scouts is not simply another after-school playtime organization; its purpose is "to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime." *Dale* v. *Boy Scouts of America*, 308 N.J. Super. 516, 524, 706 A.2d 270, 274 (N.J. Super., App. Div., 1998) (quoting Boy Scouts Mission Statement). While the Boy Scouts does not provide the complete alternative to public education that was at issue in *Pierce* and *Meyer*, there is no question that the organization fills a moral void in that education. As the California Supreme Court noted in *Randall* v. *Orange County Council*, "Parents of Cub Scouts . . . testified that they hoped certain values, including religious ones, would be instilled through the Cub Scout program, as promised by the parent handbook

for new Cub Scouts." 17 Cal.4th 736, 742, 952 P.2d 261, 265 (1998).

The view that homosexuality is immoral, though currently denigrated in some elite circles, has a long and revered tradition in this and most other countries and in most major religions. *See, e.g., Bowers* v. *Hardwick*, 478 U.S. 186, 192-94 (1986); *id.* at 196-97 (Burger, C.J., concurring). And it is still supported by criminal prohibitions against sodomy in many States and in the Uniform Code of Military Justice. *Id.* at 193-94; Jeffrey G. Sherman, "Love Speech: The Social Utility of Pornography," 47 Stan. L. Rev. 661, 698 (April 1995) (citing state statutes and Uniform Code of Military Justice). The parents who participate in the Boy Scouts because they wish to impart that and kindred moral views to their children have a constitutionally protected right to do so. The New Jersey Supreme Court's decision makes a mockery of that right.

C. THE RULING BELOW IS IMPLICITLY IN CONFLICT WITH DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS AND SEVERAL STATE COURTS OF LAST RESORT.

The Claremont Institute agrees with the Boy Scouts' claim that the New Jersey Supreme Court decision is implicitly in conflict with the decision of the Seventh Circuit in *Welsh* v. *Boy Scouts of America*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993), and with the decisions of several state courts of last resort. It further agrees with the Boy Scouts that a more stark conflict is unlikely to arise because any court inclined to agree with the Boy Scouts' position about the unconstitutionality of applying public accommodations statutes to private membership groups such as the Boy Scouts would simply interpret the relevant statute narrowly, where possible, in order to avoid the constitutional question. Because of the strength of the implicit conflict that does currently exist, however, especially with the decision of the California Supreme Court in *Curran* v. *Mount Diablo Council*

of the Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998), The Claremont Institute believes that further elaboration would be beneficial to the Court.

In *Curran*, the California Supreme Court narrowly interpreted the California Unruh Civil Rights Act as not applicable to the Boy Scouts, and therefore avoided the significant constitutional issues presented by the case. But three members of the seven member court (and arguably four), in *seriatim* concurring opinions, recognized that the Constitution required such a narrow interpretation. Justice Joyce Kennard, for example, stated that "it is highly doubtful that a state may, consistent with the First Amendment guarantees of freedom of speech and of association, compel an organization like the Boy Scouts to accept as a member someone who actively opposes one of that organization's basic precepts and who seeks membership in order to promote those contrary views." 17 Cal. 4th at 722. Indeed, Justice Kennard found the Boy Scouts' constitutional arguments "compelling." *Id.* at 725. She noted that the breadth of this Court's unanimous decision in *Hurley* "raises grave doubts whether California's legislature could ever constitutionally enact, or this court enforce, a law requiring an organization like the Boy Scouts, whose mission is to instill in boys a certain philosophy of moral behavior, to admit an individual who advances contrary views." *Id.* at 726. Significantly, Justice Kennard expressly disagreed with the decision of the intermediate appellate court which was affirmed by the New Jersey Supreme Court in the decision under review here. *See id.* at 726 n.1 (citing *Dale* v. *Boy Scouts of America*, 308 N.J. Super. 516, 706 A.2d 270 (1998)).

Justice Janice Brown echoed Justice Kennard's concern: "Any definition of [the statutory phrase] business establishment that failed to make such an accommodation [to the Boy Scouts freedom of expressive association and free speech] would raise serious constitutional questions as to application of the act." *Id.* at 734-35. Even Justice Stanley Mosk, who quite clearly disagreed with the Boy Scouts' views

on homosexuality, recognized the constitutional difficulty that would arise if the legislature sought to bring the Boy Scouts within the statute. *Id.* at 702 (citing concurring opinion of Justice Kennard).

A fourth member of the court, Justice Kathryn Werdegar, noted that the court's statutory interpretation was inconsistent with the court's own prior precedent. *Id.* at 731. Indeed, the trial court, faithfully applying that very precedent, had held that the Unruh Civil Rights Act was applicable to the membership decisions of the Boy Scouts. The trial court then held–in a decision squarely in conflict with the New Jersey Supreme Court's ruling below–that the application of the Act to the Boy Scouts was an unconstitutional infringement of the Boy Scouts right of expressive association. *Id.* at 672 (majority opinion). Because Justice Werdegar had concurred with the majority opinion in the most recent of the relevant prior cases, *see Warfield* v. *Peninsula Golf & Country Club*, 10 Cal.4th 594, 630, 896 P.2d 776, 798 (Cal. 1995), and because she gives no indication in her *Curran* concurring opinion that she had changed her view of the *Warfield* holding, she, too, should be understood as believing that the application of the Unruh Civil Rights Act to the Boy Scouts would be constitutionally prohibited. The overly-subtle distinction of existing precedent made by the California Supreme Court should therefore be seen for what it truly is–a recognition by that court that the federal constitution precluded applying the California Unruh Civil Rights Act to groups like the Boy Scouts.

The factual findings of the California courts also conflict with those made by the New Jersey court in the ruling under review. While factual errors normally do not warrant review by this court, *see* Sup.Ct. R. 10, an exception is in order when, as here, different courts make contradictory factual determinations about the same national organization and when, as here, those factual determinations are outcome-determinative in ways that affect the entire organization. *Cf. Quinnipiac*

Council, Boy Scouts of America, Inc. v. *Commission on Human Rights & Opportunities*, 204 Conn. 287, 300, 528 A.2d 352, 359 (1987) ("All of our antidiscrimination law is essentially fact-bound").

As noted by the California Supreme Court, the *Curran* trial court found, after a trial: "that sexual morality is addressed in the Boy Scout Oath and Law under the rubric of 'morally straight' and 'clean'"; "that the Boy Scouts of America as an organization has taken a consistent position that homosexuality is immoral and incompatible with the Boy Scout Oath and Law"; and that "this is the view that is communicated whenever the issue comes up." 17 Cal. 4th at 682.

In stark contrast, the New Jersey Supreme Court found–on its own initiative and in utter disregard of the Boy Scouts' undisputed evidence to the contrary, *see Dale*, 160 N.J. at 613 n.12, 734 A.2d at 1224 n.12–that "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral" and that "[t]he words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." *Id.*, 160 N.J. at 612, 614, 734 A.2d at 1224. As a result of its impromptu "factual" findings, which not only conflict with those of the California trial court but with New Jersey's own trial court in this case, *see id.*, 160 N.J. at 580-81, 734 A.2d at 1206, the New Jersey Supreme Court was able to hold "that Dale's membership does not violate Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [Boy Scouts] existing members' ability to carry out their various purposes." *Id.*, 160 N.J. at 614, 734 A.2d at 1225 (quoting *Rotary Club*, 481 U.S. at 548).

This case involves more than just a question of factual error, therefore. The New Jersey court's "factual" determination has enabled it to avoid the legal mandate of this Court's binding precedent. Moreover, because the Boy Scouts

is a national organization whose members and adult leaders may and often do participate in Boy Scouts activities elsewhere in the country, the New Jersey court is effectively able to impose the legal consequences of its "factual" findings on Boy Scout units operating in other states. In short, even the factual conflict that is present here suggests that a grant of certiorari is warranted in this case.

CONCLUSION

The Boy Scouts' petition for a *writ of certiorari* should be granted.

Respectfully submitted,

JOHN C. EASTMAN
THE CLAREMONT INSTITUTE
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
250 W. First St., Suite 330
Claremont, California 91711

EDWIN MEESE III
Counsel of Record
214 Massachusetts Ave., NE
Washington, D.C. 20002
(202) 546-4400

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

DATED: November 24, 1999